UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LINCOLN LUTHERAN OF RACINE

and 30–CA–111099

SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE WISCONSIN,
SEIU-HCWI

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for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on April 28, 2014.[1] Service Employees International Union Healthcare Wisconsin, SEIU-HCWI (the Union or the Charging Party) filed the charge on August 13, 2013 and the Regional Director for Region Eighteen of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on December 19, 2013.[2] The complaint alleges that Lincoln Lutheran of Racine (the Respondent) violated Section 8(a)(5) and (1) when, on March 19, 2013, it ceased dues check off for unit employees after the collective bargaining agreement between the parties expired. The Respondent filed a timely answer it which it denied that it violated the Act.

[1] The two witnesses and counsel for the parties were present in Milwaukee, Wisconsin. With the agreement of the parties, and given that stipulations had alleviated the need for all but very brief testimony, I conducted the hearing by teleconference in the interests of preserving governmental resources.

[2] The complaint as issued on December 19 consolidated a case from Subregion 30 (30-CA-111099) and a case from Region 18 (18-CA-112504). On March 27, 2014, following a partial settlement reached by the parties, all the allegations in the complaint that did not pertain to the Respondent's cessation of dues check off were dismissed. In addition, the two cases were severed and the Region 18 case is not part of the proceeding before me.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[3] and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a nursing home providing in-patient medical care in Racine, Wisconsin. In conducting its operations the Respondent annually derives gross revenues in excess of $100,000 and purchases and receives at its facility in Racine, Wisconsin, products, goods, and materials valued in excess of $5000 directly from points outside the State of Wisconsin. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a nursing home operator with facilities in Racine, Wisconsin. Since at least 2007, the Respondent has recognized the Union as the collective bargaining representative of a unit comprised of certified nurse aides, maintenance employees, laundry employees, housekeeping employees, and certain other employees. The Union and the Respondent have entered into successive collective bargaining agreements covering the unit, the most recent of which was effective by its terms from June 1, 2011, to December 31, 2012. The parties agreed to extend the term of that agreement to February 19, 2013. The agreement includes a dues check off provision in which the Respondent agrees to deduct union initiation fees and membership dues from the paychecks of participating unit employees and to transmit those funds to the Union.[4]

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[3] The Respondent moved to strike portions of the General Counsel's Brief because "rather than presenting only the General Counsel's argument, the General Counsel took advantage of Lincoln Lutheran having filed its brief earlier in the day by responding to Lincoln Lutheran's arguments." The General Counsel opposed the motion and it is hereby denied. I set a June 2, 2014, due date for both parties' briefs, but did not order that the briefs be filed simultaneously or otherwise foreclose one party from responding directly to arguments in the other party's earlier filed brief. The Respondent cites no authority at all for striking a brief, in whole or in part, under such circumstances.

[4] The provision states as follows:

(a) Upon receipt from a team member, Worksite Leader and/or Union Representative of a lawfully executed written authorization, Lincoln Lutheran agrees, until such authorization is revoked in accordance with its terms, to deduct the initiation fees and the regular monthly Union membership dues of such team members from the team member's first two paychecks of each month and to promptly remit such deduction to the Union, the list outlining dues payments and initiation fees will be provided to the Union by electronic mail. The Union will notify Lincoln Lutheran, in writing, of the exact amount of such regular monthly membership dues to be deducted. Team members shall be provided Union authorization forms at time of hire along with the other appropriate forms of employment. The authorization provided for by this Section shall conform to all applicable Federal and State laws.

The Union Agrees to indemnify and hold Lincoln Lutheran harmless against any and all claims, suits, orders, or judgments brought or issued against Lincoln Lutheran as a result of any action taken or not taken by Lincoln Lutheran pursuant to any written communication from the Union under the provisions of this article.

(b) The Employer agrees to deduct and transmit to SEIU COPE, $ ____ per pay period, from the wages of those team members who voluntarily authorize such contributions on the forms provided for that purpose by SEIU HEALTHCARE WISCONSIN. These transmittals shall occur

On December 17, 2012, the Respondent and the Union began negotiations for a successor to the expiring contract. The Respondent's lead negotiator was Butch Patterson, the Respondent's vice president for human resources. The Union's lead negotiator was Bonnie Strauss, a union project director. In the parties' written proposals during negotiations for a successor contract, both the Respondent and the Union proposed the same dues check off language that was present in the expiring contract. In a February 12, 2012, email, Patterson for the first time informed Strauss that the Respondent was proposing to terminate the due check off provision effective upon the expiration of the contract on February 19. Patterson stated that the Respondent was prepared to discuss the dues check off proposal at the negotiating session scheduled for February 18. Patterson further stated that the contract's union security clause and arbitration provisions would also terminate on February 19. Later that day, Strauss responded to Patterson by email as follows:

> Butch,
> So why the heavy hand? This seems out of character given our working relationship. Please advise.

Patterson responded by email:

> Hi Bonnie,
> We do have a positive working relationship and I hope it continues. We simply need to move forward quickly with our economic proposals because of continued fiscal issues. We especially need to achieve the projected labor savings regarding the shift reduction proposal. January financials did not meet budget. I am concerned that further delaying the process will make the negotiation process even more difficult. I'm looking forward to a productive session on the 18th.

The parties met to negotiate on February 18. Present for the Respondent were Patterson and three other Company officials, one of whom, the Respondent's chief executive officer, left early in the meeting. Present for the Respondent were Strauss and a union staff representative. The session lasted from approximately 9 a.m. to 4 p.m. The parties did not discuss the dues check off issue until the end of that period. At that time, Patterson stated that when the contract expired – which was set to occur the next day – the Respondent would no longer honor the union arbitration procedure, and that "after the next bargaining session," which was set for March 5, "the union security and union check off would discontinue." Strauss responded to Patterson by stating that this "was not a good way to have a good relationship, and that it would not in any way, shape or form change the way that we would represent our members, nor would it change the way that we would approach the bargain." Then Strauss asked Patterson to reconsider. At that point the management team left the session.[5]

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for each payroll period. A list of names shall be sent via electronic mail/media of those team members for whom such deductions have been made. The list will include the amount deducted for each team member.

[5] Of the persons who attended the meeting, only Strauss and Patterson were called to testify. Regarding what Patterson said at the meeting, the testimony of Strauss and Patterson was consistent and I credit that testimony. I also credit Strauss' testimony regarding what she said in response to Patterson, and that is the basis for the version of her response that is set forth above. Based on Strauss' demeanor and testimony as a whole, and after considering the documentary evidence regarding the February 18 meeting, I find that testimony credible. Patterson's very minimal testimony on the subject of what Strauss said does not corroborate Strauss' testimony, but also does not

Patterson subsequently canceled the March 5 bargaining session. In a February 28 email to Strauss, he proposed alternative dates for negotiations in March and April and stated that the Respondent "proposes the termination of the check off provision of the Agreement (see, Article 18 of the contract) effective on the next day immediately following the date of our next bargaining session" and that the Respondent "w[ould] be prepared to discuss this proposal at the next meeting." The parties held their next bargaining session for a successor contract on March 14. During that session neither side raised the subject of dues check off or the discontinuation of dues check off.

Patterson, in a March 18 email to Strauss, stated that "As previously notified (2/28/2013), Lincoln Lutheran is confirming the termination of the union check off provision of the Agreement . . . effective Tuesday, March 19, 2013." On March 19, the Respondent carried through with this action, and discontinued check off for unit employees. As of that time, the Union's written proposal still included the dues check off language contained in the expired agreement. During negotiations the Respondent never claimed to the Union that administering dues check off was a financial hardship for the Company.

After March 19, 2013, the parties continued to negotiate for a successor to the collective bargaining agreement. On about November 21, 2013, the Respondent resumed dues check off.

III. Analysis and Discussion

The Respondent stopped following the dues check off provision in the contract on March 19, 2013, subsequent to the expiration of that contract on February 19, 2013. At the time the Region issued the complaint in this case, as well as at the time of trial, the Board's most recent ruling on the subject was that an employer's obligation to adhere to a contractual dues check off provision continues after the expiration of the contract. See *Alamo Rent-A-Car*, 359 NLRB No. 149, slip op. at 4 (2013), decision set aside by 2014 WL 2929754 (N.L.R.B. June 27, 2014), and *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012). In *WKYC-TV*, the Board stated "that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement. Slip op. at 1. The Board acknowledged in *WKYC-TV* that it was overturning the rule set forth in *Bethlehem Steel*,[6] and its progeny, which was that the "obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement that establishes such an arrangement." Id. The Board explained that a coherent explanation for the *Bethlehem Steel* rule had never been provided, and noted that the U.S. Court of Appeals for the Ninth Circuit had recently refused to enforce a Board decision following the *Bethlehem Steel* rule because, in the Court's words, the Board "'continue[d] to be unable to form a reasoned analysis in support of'" that rule. Id., quoting *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 867 (9th Cir. 2011).

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directly contradict it. When Patterson was asked whether there was any response from the Union to his statement that the Respondent would cease honoring the arbitration, union security, and dues check off provisions, he testified "not regarding the union dues." This nonspecific testimony does not directly contradict Strauss' testimony because Strauss did not claim that she explicitly mentioned union dues. Patterson was not asked to recount exactly what Strauss said to him at the end of the meeting or to confirm or deny Strauss' testimony about what she said.

[6] 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964)

Subsequently, the U.S. Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the Board lacked the quorum necessary for the issuance of decisions from January 4, 2012, through August 4, 2013. Both *Alamo WKYC-TV*, supra, and *WKYC-TV*, supra, were issued during the period when the Board lacked the necessary quorum and neither decision is currently valid precedent. I find that the Board's prior rule, as set forth in *Bethlehem Steel*, is therefore controlling and that the Respondent did not violate Section 8(a)(5) and (1) on March 19, 2013 by ceasing to follow the dues check off provision after expiration of the collective bargaining agreement.[7]

For the reasons discussed above, the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act when it discontinued dues check should be dismissed.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent was not shown to have violated Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[8]

Order

The complaint is dismissed.

Dated, Washington, D.C. August 11, 2014.

PAUL BOGAS
Administrative Law Judge

[7] The parties presented evidence going to the question of whether the Union waived bargaining regarding the Respondent's discontinuation of dues check off. Given the applicability, at least until further notice, of the *Bethlehem Steel* rule, it is not necessary for me to reach the waiver issue. Nevertheless, in the previous section of this Decision, I have included all the factual findings relating to the waiver issue that are supported by the record.

I also note that in the stipulation of facts the parties entered into on April 14, 2014, they stipulated to the following: "[N]o historical information regarding the parties' bargaining history on dues check off has been set forth as it is not relevant to the current discontinuation of dues check off or the Employer's affirmative defenses thereto."; and "[N]o past practices regarding discontinuation of dues check off has been set forth as it is not relevant to the current discontinuation of dues check off or the Employer's affirmative defenses thereto."

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.